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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 451

CATHERINE BOWCOTT AND EDNA WOODCOCK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 400-406) is reported at 170 F. 2d 173.

JURISDICTION

The judgment of the Court of Appeals was entered October 29, 1948 (R. 399, 406), and a petition for rehearing (R. 407-412) was denied November 10, 1948 (R. 413). The petition for a writ of certiorari was filed December 6, 1948. The jurisdiction

of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R.Crim.P.

QUESTION PRESENTED

Whether, where the first count of an indictment for mail fraud describes the scheme to defraud, and the succeeding counts incorporate this description by reference, the succeeding counts are rendered invalid because of the dismissal of the first count or because of a defect in that count regarding the allegation of the use of the mails.

STATUTE INVOLVED

The mail fraud statute, 18 U.S.C. (1940 ed.) 338, provided as of the dates involved in this case:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or

at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

On June 22, 1944, petitioners were indicted in the District Court for the Southern District of Illinois in ten counts, each charging a violation of the mail fraud statute, *supra* (R. 2). The first count (R. 2-11) charged generally in the opening paragraph that during a period beginning a long time prior to July 1, 1941, and continuing down to the date of the indictment, petitioners devised a scheme and artifice to defraud certain named victims, including one Earl Woody, and other persons unknown to the grand jury (R. 3). The details of the scheme were then set forth with great particularity (R. 3-10), and the count closed with an allegation that on or about April 7, 1943, petitioners did "unlawfully, knowingly, wilfully, fraudulently and feloniously place, and cause to be placed in a Post Office of the United States of America, * * * to be sent and delivered by the Post Office Establishment of the United States of America," a letter, set forth *in haec verba,* addressed to Mr. and Mrs. Earl Woody, Smithfield, Illinois, "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America" (R. 10-11). There was

no allegation in this count that the mailing was for the purpose of executing the scheme to defraud. Each of the succeeding counts, 2-10, incorporated by reference the allegations of count 1 describing the scheme to defraud and each alleged that, "for the purpose of executing the said scheme and artifice, and in attempting so to do," petitioners mailed a separate letter or post card (R. 11-24).

Petitioners demurred to the indictment on the ground, *inter alia,* that the first count failed to allege that they used or intended to use the mails "in the furtherance, or in the execution of the alleged scheme to defraud" and on the further general ground that each count failed "to charge the commission of illegal acts by the defendants which constitute an offense against the United States" (R. 25-26). The demurrer was overruled (R. 26).

At the close of all the evidence, counts 1 and 10 were dismissed on motion of the Government (R. 341). Petitioners were convicted on counts 2 to 9, inclusive (R. 365, 366), and they were each sentenced to five years' imprisonment on each of counts 2, 3 and 4, to run concurrently, and fined $1,000 on each of counts 5, 6, 7, 8 and 9 (R. 373-375). Their convictions were affirmed on appeal (R. 406).

ARGUMENT

Petitioners' sole contention is that since the first count was bad for failure to allege that the mailing charged therein was for the purpose of executing the scheme to defraud, as required by the statute,

the remaining counts were also invalid because they were dependent upon count 1 by virtue of the fact that they expressly incorporated by reference the allegations of that count describing the scheme. In support of this contention, petitioners cite excerpts from cases stating that each count of an indictment is regarded as a separate charge of crime and must be sufficient in itself, and they also invoke the requirements of the Fifth and Sixth Amendments that the accused be informed of the nature and cause of the accusation against him by an indictment returned by a grand jury (Pet. 6-7).

Even if it be conceded that the first count was ineffective to charge an offense under the mail fraud statute, petitioners have no basis for complaint. The succeeding counts incorporated by reference only those parts of the first count which set forth and described the scheme and artifice to defraud. The use of the device of incorporation by reference in a multiple-count indictment to avoid repetition is familiar. This and other courts have repeatedly held that if a count to which reference is made is defective or if prosecution under it is dismissed,[1] such circumstance will not in itself vitiate the remaining counts. *Burroughs and Cannon* v. *United States,* 290 U. S. 534, 544; *Crain* v. *United States,* 162 U. S. 625; *Blitz* v. *United States,* 153 U. S. 308, 317; *Bell* v. *United States,* 100 F. 2d 474, 477 (C.A.

[1] The Court of Appeals considered the question of the sufficiency of counts 2-9 only in relation to the dismissal of count 1 at the close of the evidence (R. 404-405).

5); *Touhy* v. *United States,* 88 F. 2d 930, 933 (C.A. 8); *Wheeler* v. *United States,* 77 F. 2d 216, 218 (C.A. 9); *Barnard* v. *United States,* 16 F. 2d 451, 453 (C.A. 9), certiorari denied, 274 U. S. 736.

Petitioners' contention would have more merit if the allegations in the first count, incorporated by reference, failed to describe a criminal scheme or artifice to defraud. But no such contention is made; and it is clear that the first count sets out with particularity a scheme and artifice to defraud the persons named in the count (R. 2-10). Stripped of details, the count alleged that petitioners devised a scheme to defraud various persons by inducing them to give petitioners various sums of money upon false representations that it was to be invested in commercial enterprises to be established at Canton, Illinois, by Henry Ford and the Ford Motor Company, and that Ford and the company had accumulated huge profits which would be distributed as bonuses to investors under the guise of charitable contributions in order that the Fords might obtain deductions for income tax purposes. Other false and fraudulent promises and representations made in carrying out the scheme were alleged.

Nor is there any doubt that the eight counts on which petitioners were convicted made apt reference to the scheme and artifice to defraud described in count one. Each of these counts alleged that petitioners, "having under the circumstances and

conditions in the first count of this indictment mentioned, devised the scheme and artifice in that count described for obtaining money and property from the persons in that count named and referred to, by the means therein set forth, the allegations of which said first count descriptive of said circumstances and conditions, scheme and artifice, money and property, and of such persons and means, are incorporated in this count by this reference to said first count as fully as if they were here repeated," mailed a certain described letter "for the purpose of executing the said scheme and artifice" (R. 12, 13, 14, 15-16, 17, 18-19, 20, 21-22).

CONCLUSION

The petition should be denied.

Respectfully submitted.

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